Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| SAM ANDREWS' SONS, INC.<br><br>Respondent,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br><br>Charging Party. | ) | Case Nos. 80-CE-156-D<br>80-CE-157-D<br>80-CE-164-D<br>80-CE-203-EC<br><br>8 ALRB No. 64 |

DECISION AND ORDER

On August 12, 1981, Administrative Law Officer (ALO) Kenneth Cloke issued the attached Decision in this proceeding.[1/] Thereafter, Respondent and the Charging Party each timely filed exceptions and a brief in support of exceptions.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs of the parties, and has decided to affirm his rulings, findings, and conclusions only to the extent that they are consistent herewith.

Facts

Negotiations began in January 1979 between the United Farm Workers of America, AFL-CIO (UFW) and Respondent with Paul 'Chavez as the UFW negotiator and Tom Nassif as negotiator for

[1/] During the hearing in this case, charges number 80-CE-156-D, 80-CE-157-D, and 80-CE-164-D were settled.

Respondent. A number of language proposals had been exchanged by the time that Ann Smith took over negotiating for the UFW in September 1979. However, little progress had been made.

On November 5, 1979, the UFW submitted its first complete proposal to Respondent. The Company responded with a complete counter-proposal on November 7, 1979. Both proposals drew heavily from the Sun Harvest contract negotiated earlier that year between the UFW and Sun Harvest.

On November 15 and 20, 1979, Nassif had off-the-record discussions with Ann Smith and UFW chief counsel Jerome Cohen regarding the Sun Harvest contract. Nassif queried whether the Union was offering the Sun Harvest contract. Nassif stated that, if so, the parties should cut through all the formalities and attempt to reach agreement on the Sun Harvest proposal. A bargaining session was held on November 17, 1979, at which time a general discussion of the Company's counter-proposal was held and the Union recited the articles on which they believed there was agreement. Another bargaining session was held on November 20, 1979. Very little evidence was presented on the record as to the events of this session. There were no further meetings held until January 15, 1980.

The record is again scant as to the bargaining session of January 15, 1980. A bargaining session was held on January 24, 1980, at which Smith and Cohen inquired off-the-record as to whether Respondent would accept the Sun Harvest agreement, with the addition of a cotton differential and hiring procedure other than the hiring hall in Bakersfield. These additions had been previously

opposed by the UFW. Smith and Cohen specifically asked Nassif and Don Andrews to discuss this possibility and to get back to them. There were no further negotiation sessions until April 15, 1980.

On February 12, 1980, Don Andrews, the company principal responsible for labor relations, dictated a cassette tape, which was transcribed on February 13, by Nassif. Noting gaps or long pauses on the tape itself, Nassif contacted Don Andrews and informed him of the 'gaps'. Nassif then gave the transcription to Don Andrews to check and make necessary corrections. Andrews reviewed and corrected his copy of the transcript, which had indicated acceptance, rather than rejection of Sun Harvest articles 44-47. Andrews also indicated that there were no gaps in the tape. Andrews sent Nassif a photocopy of the corrected transcription; however, Nassif did not check the returned transcript for corrections .

Nassif testified that he used the original uncorrected transcription, along with Andrews' comments and previous proposals and agreements, to compose a March 21, 1980, letter to the UFW. This letter constituted Respondent's counter-proposal to the UFW's January 24, 1980, proposal regarding the Sun Harvest contract. This counter-proposal was mailed to the UFW on March 21, 1980, with a copy to Andrews, incorporating approval of articles 44-47 of the Sun Harvest contract.

The proposal was received by the Union on March 24, 1980, and answered on March 25, 1980, by Ann Smith who expressed encouragement at the movement in the Company's bargaining position and specifically mentioned the movement on Sun Harvest' articles 45 and 46.

Ann Smith testified that she believed that March 21 letter to be the latest Company proposal because it listed the Company's position on various contract terms including changes in the Company's position. She testified that the Union believed the Company was changing positions on articles 44-47 with the intention of moving the bargaining forward. Tom Nassif testified that he too saw it as a major move by the Company, that it was a good sign in that the parties had been stalled for some time.

Don Andrews received all this correspondence, but after reading the first paragraph of the March 21 letter, put it in a file and did not make any detailed analysis of it. Andrews stated that he did not analyze it because he had already spent a lot of time with Nassif on the draft, had sent Nassif the corrected draft, and felt that that was sufficient. Andrews did not expect to find anything different in the letter than was in his draft. Andrews further testified that he did not read the Union's March 25 response which drew attention to the mistaken articles. Rather, he put it directly into his file, without reading it, stating that he did not usually read letters that came in from Smith because they were really addressed to Nassif, and Nassif was handling the affairs.

At the next negotiating session on April 15, 1980, Smith went through the Company's March 21, 1980 proposal, item by item, including articles 44, 45, and 46. The Union, relying on the Company movement in the March 21 proposal, changed its position by offering a ten cent cotton differential, a significant concession since the Union had, to this point, insisted on an equal wage scale

in all job operations in all crops. Although both Nassif and Andrews were present, neither made any comment at the time regarding any error. Andrews took extensive notes during this session and placed question marks next to articles 45-47 of the Sun Harvest contract.

Nassif and Andrews then met in caucus. Andrews testified that it was at that point that he raised the issue of mistake or error with Nassif. After caucusing, Nassif and Andrews returned to the session and discussed the next meeting date. Neither Nassif nor Andrews mentioned to the Union at that meeting that there was any question or problem with Smith's careful outlay of the status of each article. Thus, the meeting was concluded without mention of the error.

Nassif testified that when he and Andrews went back to Nassif's office after the negotiating session, Andrews told him that Andrews could not understand why Smith believed they had reached agreement on those articles. Nassif told Andrews that there was agreement on the basis of the tape and transcription and that Nassif had made the March 21 proposal, accepting those proposals. They then went and listened to the tape in Nassif's office and Nassif then realized that there was a mistake.

Nassif called Smith that afternoon, apologizing and informing her of the error and how it had been made. Smith could not believe that such a mistake was possible, given all the correspondence and discussion of these issues. Smith further stated that this mistake was unacceptable to the Union and would result in an unfair labor practice. Nassif immediately offered to allow the

Union to withdraw their concession on the cotton differential that was made in reliance upon the mistake. Smith reiterated that the Union would hold the Company to their position, pointing out that Andrews had been sitting there at the meeting as she specifically listed the articles without batting an eye or indicating any problem, and it was just too hard to believe. Nassif talked with Smith a second time that day on the phone and told her that a mistake this obvious could have only happened by inadvertence and was not intentional. Smith then met with members of the employee negotiating committee, and committee members were angry and disappointed with the "illusion" of progress.

On April 21, 1980, Smith met with Nassif. Andrews, for the first time, was not present, due to weather conditions. Nassif again apologized and explained again the events which caused the error. The employees present communicated their disbelief and disappointment and asked Nassif if there still could be trust between them. Nassif said he thought so. As this dialogue continued, Nassif became increasingly hostile to the workers, accusing the Union of deceiving the bargaining committee. Nassif finally stood up and left the meeting.

Although numerous letters were exchanged, no meetings were held from April 20 until October 7, 1980. The UFW attempted to set up meetings, but no meetings took place due primarily to Nassif's scheduling problems. During the April-October 1980 time period, no new proposals were made or agreements reached. Similarly, no progress was made at either the October 9, or October 28, 1980, meetings. General Counsel and the UFW attempted to offer

evidence of these bargaining sessions. Respondent objected as to relevancy, stating that the only issue was whether there had been a mistake, and therefore that subsequent bargaining sessions would not shed light on Respondent's posture on April 15, 1980. The ALO agreed initially, but later allowed General Counsel to put on limited evidence of these bargaining sessions. The result is that the record is not fully developed as to these bargaining sessions. However, the record is clear to the extent that no progress was made after the April 1980 withdrawal of articles 44-47.

Discussion

The UFW argues in its exceptions that there was no mistake, and further, that the retraction was made to prevent agreement, not to correct an error. Respondent argues that the retraction was based on an honest mistake, and that, since there was good cause for retraction, there is no evidence of bad faith.

It is well established that withdrawal of tentative agreement on bargaining proposals, without good cause, is evidence of bad faith bargaining. (American Seating Company of Mississippi v. NLRB (5th Cir. 1970) 424 F.2d 106 [73 LRRM 2996]; Waples-Platter Companies and Chauffeurs (1974) 214 NLRB 483 [88 LRRM 1176].) However, the record in this case establishes that the miscommunication between Respondent and its negotiator caused a genuine mistake, and was not as the UFW contends, an effort to intentionally mislead the Union. We therefore find, in the isolated context of Respondent's March 21 proposal, that Respondent had good cause for withdrawing its proposal and did not renege on a tentative agreement. We are not persuaded, however, that Respondent's mistaken

proposal of March 21, 1980, was consistent with the duty to bargain in good faith.

A company's good faith may be tested by considering whether it would have acted in a similar manner in the usual conduct of its business negotiations. (Reed & Prince (1951) 96 NLRB 850, 852 [28 LRRM 1608].) That is, a company must treat the bargaining obligation as seriously as it would any other business transaction. The failure to devote sufficient time and attention to the bargaining obligation has been found to be disruptive and in derogation of the collective bargaining process. (Harry R. Pickett (1969) 174 NLRB 340, 342 [70 LRRM 1189]; Hemet Wholesale Company (Oct. 28, 1978) 4 ALRB No. 75.)

In the instant case, it is evident that there has been negligence on the part of both principal Don Andrews and negotiator Tom Nassif. Respondent demonstrated a lack of seriousness toward the negotiations by failing to check its own proposals for accuracy and by paying no attention to communications between its negotiator and the UFW. We find that Respondent's inattention to its own communications with the Union evidences a lack of good faith and sheds doubt on the seriousness of Respondent's desire to reach agreement.[2/] We do not find, however, that this incident, which is

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[2/] Member McCarthy dissents from the majority's finding that the mistake in question resulted from negligence and thus constituted bad faith on the part of Respondent. There is no question in his view that had Respondent reviewed in its entirety its copy of a 'letter written by its negotiator to the UFW, it would have detected that its intended response to the Union's contract proposals was erroneously reported. Nor does he doubt that such mistakes may have

[fn. 2 cont. on p. 9]

only a part of the long and complex bargaining history between the parties, is sufficient in itself to prove that Respondent was bargaining in bad faith overall. We have stated that a finding regarding bad faith bargaining must be based on the totality of the circumstances of the negotiations. (0. P. Murphy Produce Co. (Oct. 26, 1979) 5 ALRB No. 63.) This case presents too few circumstances to support such a finding.

ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: September 15, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. MCCARTHY, Member

JEROME R. WALDIE, Member

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(fn.2 cont.)

considerable impact on the bargaining process. However, he recog nizes that honest mistakes and misunderstandings do occur, notwithstanding the best intentions and efforts of the parties, and therefore need to be evaluated against the particular facts of each case. He finds no basis for the majority's inference that Respondent would not or could not have made a comparable error in conjunction with its other business matters. Member McCarthy would also 'find that the ALO's reliance on Respondent's past involvements with this Board and his numerous characterizations of Respondent, which have no support in the record in this proceeding, were unwarranted and injudicious. (Farah Manufacturing Co., Inc. (1974) 214 NLRB 304 [87 LRRM 1323].)

# CASE SUMMARY

Sam Andrews' Sons (UFW)

8 ALRB No. 64
Case Nos. 80-CE-156-D
80-CE-157-D
80-CE-164-D
80-CE-203-EC

## ALO DECISION

The ALO found that Respondent violated Labor Code section 1153(e) by failing to bargain in good faith when it withdrew agreed-upon proposals. The ALO found that Respondent's agreement to said proposals was due to a clerical error, but that Respondent failed to exercise due care in checking its proposals for accuracy and paid no attention to communications from its own negotiator and the Union. The ALO ordered makewhole from the time of Respondent's withdrawal of said proposals on April 15, 1980.

## BOARD DECISION

The Board adopted the ALO's rulings and findings as to Respondent's lack of attention to the bargain process, as evidenced by its mistaken agreement to certain Union proposals. However, the Board found that Respondent's mistake, though evidence of bad faith, was insufficient by itself to support the conclusion that Respondent was bargaining in bad faith overall. The complaint was therefore dismissed .

Although Member McCarthy concurred in the result of the majority opinion, he dissented from the finding that the mistake in question resulted from Respondent's negligence and thus constituted bad faith.

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BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

OF THE STATE OF CALIFORNIA

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| In the Matter of:<br>SAM ANDREWS' SONS,<br><br>Respondent,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br><br>Charging Party. | CASE NO. 80-CE-156-D<br>80-CE-157-D<br>80-CE-164-D<br>80-CE 203-EC |


DECISION

Appearances:

For the General Counsel:
Manuel M. Melgoza
627 Main Street
Delano, California

For the Respondent:
Merrill F. Storms, Jr.
1221 State Street
El Centro, California

For the Intervenor:
Carmen Flores
P.O. Box 30
Keene, California 92531

Kenneth Cloke, Administrative Law Officer

## STATEMENT OF THE CASE

This matter was heard before me on January 27, 28, February 2, 3, 4, 5, 11, 18, March 3, 4, 6, 11, 13, 1981 in Delano, Bakersfield and El Centro, California. A complaint was filed and served on December 2, 1980, based on the first three charges, and an answer was filed on December 11, 1980. A First Amended Consolidated Complaint was served and filed, adding the last charge, on January 7, 1981. Midway through hearing, the first three charges settled, leaving only paragraphs 1-7, 11 and relief prayers 2, 3, and 6-11 of the First Amended Complaint for decision . Judicial notice was requested and taken of prior proceedings before this Agency involving the same Respondent.

All parties were represented by counsel and afforded full opportunity to conduct a hearing, including the right to call and examine witnesses, present documentary evidence, and argue their positions orally and in writing. Briefs were received from all parties on June 17, 1981. Based on the record as a whole, including observation of the demeanor of the witnesses, I reach the following decision.

## FINDINGS OF FACT

1. Jurisdiction.

Respondent is an agricultural employer, and the United Farm Workers of America, AFL-CIO (hereinafter "UFW") is a labor organization, within the meaning of the Agricultural Labor Relations Act (hereinafter "the Act").

Respondent's supervisors and attorneys acted at all times as its agents, as did negotiators for the UFW. The UFW is the certified collective bargaining agent for Respondent's employees.

2. Background.

In 1975, an election was held among Respondent's agricultural employees, but was set aside by the Agricultural Labor Relations Board (hereinafter "ALRB") due to multiple unfair labor practices committed by Respondent. Sam Andrews' Sons, 3 ALRB No. 45 (1977). A new election was held in July, 1977, in which the UFW was elected and subsequently certified as collective bargaining agent. Sam Andrews' Sons, 4 ALRB No. 59 (1978). Negotiations began in January, 1979, during which Respondent was twice found to have violated the Act. In Sam Andrews' Sons, 5 ALRB No. 68, Respondent was found to have made discriminatory work assignments, discharges and demotions. In Sam Andrews' Sons, 6 ALRB No. 44 (1980), Respondent was found to have violated sections 1153 (a) and (c) of the Act, and to have exhibited anti-union animus.

In addition, 35 charges including several based on bad faith bargaining and unilateral changes in working conditions, and some 20 charges including retaliatory discharge, layoffs and threats based on union affiliation have been tried and are awaiting decision by Administrative Law Officers before this agency. (See Cases 79-CE-13-D et al., and 80-CE-20-D et al., respectively.)

3. History of Negotiations.

Negotiations began in January, 1979, and on November 5, a first complete proposal was submitted to the Company by the UFW. The Company responded on November 7 with a complete counter-proposal. Both proposals' drew heavily from a "model" contract negotiated earlier between the UFW and Sun Harvest, Inc. See General Counsels' Exhibits, hereinafter cited as GCX 6, 7 and 20.

On November 15, Thomas Nassif, attorney and negotiator for Respondent, asked how the Sun Harvest agreement might fit into negotiations since both parties appeared to be moving in that direction. (Reporters' Transcript, Volume XII, pp. 206-7, hereinafter cited as RT XI, 206-7.) The Sun Harvest proposals were discussed off-the-record on November 15, and again on November 20, and were referred to by the parties in their correspondence thereafter. (See, e.g., Respondent's Exhibit, hereinafter cited as RX, F).

On January 24, 1980, a meeting was held between the parties, at which the union inquired as to whether Respondent would accept the Sun Harvest agreement, with the addition of a cotton differential and hiring procedure other than the hiring hall in Bakersfield. (RT XII, 168.) These additions had previously been opposed by the UFW. Union negotiators ..asked Company representatives to discuss this possibility to get back to them. Ibid.

On February 12, Don Andrews, Respondent's principal, dictated a cassette tape (RX D), which was transcribed on

February 13 by a Word Processor employed by Mr. Massif, and given by him. Mr. Nassif contacted Mr. Andrews regarding several gaps in the tape. He sent the transcript (RX E) and tape to Mr. Andrews, who informed him that the gaps were insignificant.

Mr. Andrews corrected his copy of the transcript, which had indicated, by omission of a colon which had not been dictated, but implied in tone and timing, acceptance rather than rejection, of Articles 44, 45, 46, and 47 of the Sun Harvest agreement. These articles concerned respectively, delinquencies, cost of living allowance, union respresentatives, and injury on the job.

Listening to the tape and examining the transcript, it is clear that an error in transcription was made. Mr. Andrews returned the corrected proposal to Mr. Nassif (RT XIII, 104-6), according to him, before March 21 (RT XIII, 27), but according to Nassif, possibly after that date (RT XII, 175-6). Mr. Nassif did not check the returned transcript for corrections, since he had been concerned only about the gaps.

Mr. Nassif used the original uncorrected version of the transcript to prepare a counter proposal in response to the UFW's request of January 24 regarding the Sun Harvest Agreement. (See GCX 8) This counter proposal was mailed to the UFW on March 21, with a copy to Mr. Andrews, incorporating approval of Articles 44-47 of the Sun Harvest Agreement.

The proposal was received by the Union on March 24, and answered on March 25 calling attention to the Company's change of position on Articles 44-46 with a copy to Mr. Andrews. Ms. Smith, the UFW's negotiator, indicated her

pleasure with the Company's movement, implying a likely acceptance, although the Sun Harvest language was a compromise from its original proposals on those subjects. Article 47 had already been agreed to.

On March 26, Mr. Massif wrote to Ms. Smith, with a copy to Mr. Andrews, indicating Respondent's intention not to grow cantelopes the following season, but not mentioning the Sun Harvest Agreement or the UFW's letter.

Don Andrews received all this correspondence, glanced at their first paragraphs, and placed then in a file. CRT XIII, 27-30) Mr. Andrews testified it was his general practice to simply glance at letters he receives from Ann Smith or Thomas Nassif, and not to read them or make any detailed analysis of them. (RT 30-2) While Mr. Andrews testified he generally left the formulation of bargaining proposals to Mr. Nassif, his active role in bargaining negotiations and detailed counter-proposal regarding the Sun Harvest agreement belie this claim.

The next negotiating session took place on April 15, 1980, at which Ms. Smith went through the Company's March 15 proposal item by item, indicating agreement to Articles 44, 45 and 46, and changing its position by offering a lOgf cotton differential. Mr. Nassif and Mr. Andrews were both present. Mr. Andrews took extensive notes and placed blue question marks next to the articles concerning cost of living adjustment and union representatives. Afterward, he placed red question marks next to the articles on delinquency and injury

on the job. (See RX J; RT XIII, 38-40) Mr. Andrews made no comment at the time regarding the error, although some discussion took place on clarification regarding other issues and setting a date for the next meeting. (See RT IX, 141)

Mr. Nassif and Mr. Andrews then met in caucus. Mr. Andrews testified he then raised the issue of mistake or error, whereas Mr. Nassif believed the first recognition of error on Mr. Andrew's part came after the close of negotiations.

Mr. Nassif and Mr. Andrews returned to the session, and Mr. Nassif stated he agreed with Ms. Smith's proposal that they discuss several issues other than those contained in Articles 44 - 46 at their next meeting. They concluded the meeting at 2:45 PM without mention of the error.

At about 4:15 PM on the same day, Ms. Smith received a telephone call from Mr. Nassif, apologizing and informing her of the error. Mr. Nassif and Mr. Andrews had returned to Mr. Nassif's office, listened to the tape and examined the transcript and concluded an error had been made. Ms. Smith met with the union's bargaining committee before the next scheduled negotiation on April 21, 1980, and informed them of the retraction. They were angry and incredulous over the failure of the company to correct its error earlier, and were disappointed that the progress they believed had begun to point toward an agreement, was illusory. (RT XI, 4-6)

On April 21, Ms. Smith met with Mr. Nassif, though Mr. Andrews, for the first time, was not present, ostensibly due to weather conditions. Mr. Nassif again apologized and recounted the facts which established the error. The employees present

indicated their disbelief, and blamed the company for a loss of trust. This exchange went on for perhaps 20 minutes. According to Ms. Smith, Mr. Nassif was in a hostile mood. He challenged everything anyone said, telling people they did not know what they were talking about, and accusing the union of deceiving the bargaining committee. Ms. Smith told Mr. Nassif "why don't you shut your fucking mouth", and Mr. Nassif left. (RT XI, 8-16) Mr. Massif's account is in substantial agreement. (RT XI, 15; XII, 196)

No further sessions took place until October 7, and no new proposals or agreements took place. A session held on October 28 produced similar results. During this time, the Company allegedly attempted to unilaterally implement a wage increase and other changes in working conditions. (RT XI, 20-3; GCX 17) On October 28, the UFW offered a 35 wage differential, without response from the Company to the date of hearing. (RT XI, 21-2) No progress, in short, has been made since April 15, 1980.

## CONCLUSIONS OF LAW

It has now been six years since Respondent's first efforts to block union organization, and four years since certification, and there is still no contract. While some of this delay may be attributable to the union, a considerable portion has been due to the Company's lack of interest, delaying tactics, busy schedule, and lack of availability. See McFarland Rose Production, et al., 6 ALRB No. 18 (1980).

More perhaps, it is due to a general and deeply held opposition to unionzation among its employees.

With regard to the particular facts of this case, it is well recognized that an employer may modify the terms of its offer at any time prior to- provisional agreement by the union. German, Basic Text on Labor Law p. 409 (1976). At the same time, an employer may not mislead the union into believing that agreement has been reached on some issues, in order to obtain concessions on others. NLRB v. Mayers Brothers, Inc. (4th Cir., 1967) 383 F.2d 242, 66 LRRM 2031. In NLRB v. Midvalley Steel Fabricators (2d Cir., 1980) 102 LRRM 2062, cited by the UFW in its brief at p. 33, an employer agreed to a union proposal and told the union negotiator he would make contact if there were any errors or mistakes. Five days later, the employer called to say there were four points that had to be changed. The Court agreed with the Board and ALJ that the employer had manifested his assent both directly and by his silence, on the days following.

In Hemet Wholesale Company (1978) 4 ALRB No. 75, the Board approved an ALO decision in which a typographical error led to acceptance of articles which the company later illegally retracted. There also, the agreement may have been a mistake, but it was one that was produced by a lack of serious intent to negotiate on the part of the company.

In both cases, a legitimate company error was held to be a violation of law, notwithstanding the good faith

of the company in making the error, due to delay and underlying evidence that the company was not bargaining in good faith. While Respondent argues that contract law is not generally applicable, the principle that an error may be nonetheless binding on its maker 'is recognized both in contract and labor law.

Respondent, however, relies on McLean-Arkansas Lumber Co., 109 NLRB 1022 (1954), in which a negotiator agreed to an arbitration clause in a proposed contract based on a mistaken understanding of what had been agreed to in conference with a federal conciliator. The union agreed, and the parties met the following day to sign the contract. The employer read the tentative contract and refused to sign it. The trial examiner held, sustained by the Board, that although a definite contract had been agreed to, it had been based on misunderstanding regarding the employer's intentions, and there was no unfair labor practice in refusing to sign the agreement once the mistake was discovered. The discovery, however, was quick and without fault on the part of the Respondent.

Similarly, in Apache Powder Company, 223 NLRB .191 (1976), the Board rescinded an agreement based on unilateral mistake, and held that an employer's refusal to execute the agreement was not unlawful, where the employer was not aware of the mistake when it made the proposal. When the employer discovered its mistake, it immediately notified the union, and refused to execute the contract until the error was

corrected. Moreover, the Board noted that the mistake should have been obvious to the union as it was a substantial change from the employer's previous bargaining position. While Respondent argues this case is similar to the present one, since "the employer had never given any indication of agreement to Articles 44, 45 and 46." (Respondent' s Brief, p. 29), it had indicated by word its intent to renew negotiations, and Mr. Nassif, Respondent's negotiator, wholeheartedly approved of the move. All the Company did was to accept the standard contract language from a model agreement, which was not unusual or "obvious" error. While the employer notified the union as soon as it realized, by its admission, that a mistake had been made, this was quite late, and after the union had altered its position in reliance on the offer.

Respondent also cites American Seating Co. v. NLRB, (5th Cir., 1970) 424 F.2d 106, 107-8, in which the company made proposals, then informed the union that the provision was being withdrawn because the company had made a serious mistake in calculating the effect of the proposals, which could have resulted in discriminatory treatment of older and more experienced employees. The Court, Trial Examiner and Board found that the provision had been withdrawn in good-faith. Here, however, there is no showing by Respondent's of mistake in substance or calculated effect, and American Seating is inapplicable.

Respondent correctly argues that clerical errors should not be affirmed as the intended positions of the parties. East Texas Steel Casting Company, Inc., 191 NLRB 113 (1971) enf'd 457 F.2d 879 (5th Cir. 1972); Franklin Hosiery Mills, 83 NLRB 276 (1949); While this is generally the case, Respondent cannot use a clerical error to cover for its general lack of attentiveness or interest in bargaining to agreement.

Respondent cites NLRB v. Handle-Eastern Ambulance Service, Inc. (5th Cir. 1978) 584 F.2d 720, in which the the Fifth Circuit determined that an employer who had withdrawn its proposals when economic conditions changed and been placed in a stronger bargaining position, had "good cause" for the withdrawal. The Court examined the negotiations as a whole and found no bad faith in the company's action. Here, however there was no substantive justification for the Company's refusal to agree with the proposals in question, and considerable evidence of bad faith in the company's conduct, considered as a whole.

It is true, as Respondent asserts, that:

> "Withdrawal from apparent or tentative agreement is justified whenever the change was not designed to block agreement but was consistent with legitimate bargaining strategy." Stoner Rubber Co., 123 NLRB 1440, 1441 (1959).

Yet that is manifestly not the case here, unless the mistake was planned, which is unproven.

Respondent further cites Logging Meat Co., 206 NLRB 303 (1973), in which the NLRB held that an employer who withdrew contract provisions after the union's membership had ratified the proposed agreement, but prior to communication of acceptance had not bargained in bad-faith. Yet, as Respondent concedes, the Board found the reasons for rejecting the provisions in question were not frivolous, since they involved terms the employer did not intend to include in the contract. While Respondent agrees that "Articles 44, 45 and 46 involved terms that Respondent had never previously indicated a willingness to accept and did not intend to include such terms in the contract. This assertion is hard to accept, as these subjects are common in all labor agreements, some provision on these subjects would be likely in any agreement, and Respondent made no counter-proposals, and offered no substantive arguments against these provisions.

While Respondent cites Central Missouri Electric Cooperative, Inc., 222 NLRB 1037 (1976), the Board there ruled that an employer's withdrawal of an agreed-upon offer during negotiations was not a refusal to bargain, since "the employer did not engage in a pattern of conduct which was designed to avoid agreement with the Union. Here, the employer's pattern of conduct, from 1975 to ... present, show the opposite.

Respondent agrees in its Brief, that:

> "when evidence clearly indicates that an employer withdraws previously agreed upon

> proposals in an effort to avoid entering into an agreement with the union, then the employer may not be bargaining in good-faith. See e.g., NLRB v. A.W. Thompson, Inc., 449 F. 2d 1333, 1335 (5th Girl 1971); Great Western Broadcasting Corp., 139 NLRB 92 (1962) (employer did not bargain in good-faith when it revoked all concessions and renewed original demands after lengthy negotiations, and granted a unilateral change in wages, hours and terms of employment.)" Respondent's Brief, p. 36.

It asserts that there is not such evidence in the present case, yet its history of unfair labor practices, unilateral changes, and superficial bargaining strategy prove otherwise.

Respondent argues that ⌜an employer may be deemed to have bargained in bad-faith when it revokes proposals without giving any explanation." Id., citing e.g., James F. Stanford, Inc., 249 NLRB No. 73 (1980); United Brotherhood of Carpenters and Joiners of America, AFL-CIO Local Union No. 1780, 224 NLRB No. 26 (1979). While Respondent explained it had made a clerical error, it gave no substantive explanation as to why the Sun Harvest proposals were unacceptable, and poisoned .the atmosphere of negotiations. There was no "legitimate bargaining strategy" either in the error, or in the lack of substantive argument over these proposals.

The errors here concerned three crucial elements in the union's proposal, which the company negotiator believed appropriate as a way of moving negotiations forward, where the company had ample notice and opportunity to correct, where the union relied on acceptance in formulating its counter-proposals, and where the company had accumulated a lengthy record of unfair labor practices and union busting techniques, ranging from discharge of union adherents to evictions and unilateral changes, and had embarked on a campaign to destroy the union. These factors indicate that while the company may have made a legitimate clerical error, its' failure to correct that error indicates a general attitude toward collective bargaining, that was designed to frustrate the purposes of the Act.

There is no question, based on the record evidence, that Respondent made a clerical error in agreeing to the provisions in question. Yet it offered no substantive reasons for failing to do so, made no alternative proposal, and simply denied it intended to include these items in its ultimate agreement. It failed to exercise due care in checking the proposals for accuracy, and paid no attention to communications from its own negotiator and the Union relying on the error. These errors were not '"innocuous" (See Respondent's Brief, p. 38), nor were they based on any substantive rationale, such as a change in employee thinking, Vulkan Steel Tank Corp., 106 NLRB 1278 (1953); ambiguity in language, Holmes Typography, Inc., 218 NLRB 518 (1975); changed circumstances or any other reasonable explanation.

Under the ALRA, good faith is determined by examing the totality of the circumstances:

> "We must judge whether Respondents bargained in good faith by examing the totality of the circumsatnces including the parties' conduct and statements at and away from the bargaining table. In so doing, we must treat facts as an interrelated whole, for while some conduct standing alone may constitute a per se violation of the- Act, other conduct, innocuous in and of itself, may support an inference of bad faith when examined in light of all the evidence. Montebello Rose, 5 ALRB No. 64 (1979) at p. 7.

One of the factors to be considered, as the UFW pointed out in its Brief, is the length of the overall negotiations in the industry.

> "To conduct negotiations as a kind of charade or sham, all the while intending to avoid reaching agreement, would of course violate 8(a)(5) and amount to 'bad faith' bargaining. . . . [W]here years pass without an agreement being reached, the conduct of the parties must be scrutinized carefully, especially when experience discloses that collective bargaining agreements are usually reached in a fraction

of that time. Continental Insurance Co. v. NLRB, 495 F.2d 44, 86 LRRM 2003, 2004, 2005 (1974).

Negotiation sessions between Respondent and the UFW have been continuing for three years, since certification, without result. Respondent has avoided obvious indicia of illegality in these proceedings, but its overall record of discrimination and anti-union animus demonstrates it has no intent of complying with the Act.

Good-faith bargaining requires more than mere "pro forma" compliance. Surface bargaining, failure to provide an authorized negotiator with authority to bind the company, unreasonable delay, and lack of serious intent also are prohibited by the Act. The failure to offer substantive objections to the Sun Harvest proposals blocked further negotiations, and General Counsel's citation of the following language from Alterman Transport Lines, 587 F.2d 212 (1979), is most apt:

> "If the employer has an objection to a union proposal or a tentative agreement, it is generally obligated to express that objection so that meaningful bargaining can proceed. Whether the objections is withheld intentionally. . . or because the negotiators are in the dark about the intentions of their principal, the employer's conduct is equally inconsistent with the

requirements of good failth bargaining."

General Counsel's Brief, p. 38.

Mr. Nassif's view that Mr. Andrews first brought the error to his attention after the session in his office (RT XII, 225) is the more probable, since as negotiator, his professional reputation was involved, and he would be more likely to recall the first shock of realization that he had erred. Moreover, this version helps explain why no representation was made at the session that there had been an error, and is consistent with Don Andrews' lack of seriousness regarding the original proposal, and his failure to read the unions written response.

General Counsel cites Hemet Wholesale Co., 4 ALRB No. 75, where the Board noted it was improbable that a omission of proposals was the result of a typographical error, since the proposal was reviewed by Respondent and its netotiator after it was typed. Here, there was no review, and a mistake of fact is apparent. The Board commented, however, that collective bargaining was a serious matter, and that the parties must address sufficient attention to its processes, in order to achieve the statutory goal. Here, Respondent failed to read its correspondence or check its proposal for errors, which, in context, displays bad-faith in negotiations, and a lack of attentiveness to the requirements of good faith bargaining under the Act.

As the NLRB explained in Waples-Platter Companies, 215 NLRB No. 80,

> "It is . . . of particular importance, when the parties have made substantial progress toward agreement, that the momentum not be dissipated lightly. To this end. the Board views with concern 'a party's withdrawal of concessions made in negotiations, albeit tentatively, and regards as evidence of bad faith the failure to reasonable [sic] explain such withdrawal . . .[Citations omitted.]" Id., at 485.

The existence of collective bargaining as a viable alternative to violence and the disruption of commerce, depends on a fragile element: faith that one's oppoinent is acting in good will. This element, without which bargaining becomes a sham is destroyed as easily by inention as by negligent or reckless disregard. Respondent had to have been aware of the importance of these provisions and this offer to the union, in light of prior bargaining history. It's failure to check its own proposal for error or even read the Union's response goes deeper than clerical error, and displays its attitude toward the negotiations as a whole. While the clerical error may have been made by the law firm, the bad faith refusal to take negotiations seriously came from the client.

## REMEDY

To return the parties back to square one after four years of fruitless negotiations would be unconscionable. These employees have been deprived of their statutory right to expect good faith bargaining from Respondent, not by its simple clerical error, but by its failure to seriously negotiate.

This Company has expended thousands of dollars in an effort to block self-expression and freedom of choice by its employees, and will undoubtedly spend thousands more appealing this and other decisions, in the hope that its employees will become discouraged and lose their resolve.

To protect against such discouragement, the NLRB has held employers responsible for the consequences of their acts, and to the provisions they have, in bad faith, withdrawn. Even though Respondent's mistake was real, it poisoned the atmosphere of negotiations by failing to take them seriously. The Company erred in its failure to correct its proposal, read union correspondence, or act timely to rectify the mistake, if noticed, at the April 15 meeting, as well as by it behavior at the April 21 meeting, in front of the Union's negotiating committee, and now must rectify these mistakes. In light of its failure to offer any substantive objection to the Sun Harvest provisions, I will direct that Respondent return to the bargaining table on the basis of an implied-in-law agreement to those provisions. The principle of equitable estoppel as well precludes Respondent, following

Union reliance, from withdrawing its offer. It failed to exercise due diligence to discover or correct it, and now must accept the consequences of its failure. As between the Union, which has not behaved improperly, and Respondent, which has, the choice is clear as to who should suffer the loss occasioned by Respondent's bad faith.

Respondent correctly asserts that ALRB investigators ought to have determined, based on the tape recording, that an error had been made. It might still proceed, however, on the theory thatRespondent had ample notice and opportunity to correct, and had displayed bad-faith in its failure to read communications from the Union, discover the error, correct it in time, or before the next bargaining session, or offer any substantive reason for its refusal to consider the proposals in question.

In context, it is clear that Respondent had no serious intention of reaching an agreement with the union. Certification took place in 1975, yet, still there has been no agreement. Numerous unfair labor practice charges have been filed against Respondent over the past four years, and many days have been spent in hearing testing its compliance with the Act. Two major unfair labor practice cases have been brought against it, on which decisions are pending. While no final decision has been reached on these charges, Respondent has been recognized by the ALRB to have exhibited anti-union animus on previous occasions, and in general, may be seen to be

uninterested in the kind of compromise and dialogue that are sina qua non of effective bargaining.

I therefore conclude that Respondent violated section 1153 (e) of the Act by failing to bargain in good faith.

## ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Sam Andrews' Sons, it officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined by Labor Code section 1155.2 (a), with the United Farm Workers of America, AFL-CIO (UFW) as the certified exclusive collective bargaining representative of Respondent's agricultural employees, by failing or refusing to bargain regarding wages and working conditions of its agricultural employees.

(b) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of rights guaranteed them by Labor Code section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees on the basis of its proposal of March 21, 1980, and if an agree-

ment is reached, sign a written contract incorporating that agreement, at the request of the UFW.

(b) Make whole all agricultural employees employed by Respondent in the appropriate bargaining unit at any time during the period from March 21, 1980, to the date on which Respondent commences to bargain in good faith and thereafter bargains to a contract or a bona fide impasse, for all losses of pay and other economic losses they have incurred as a result of Respondent's refusal to bargain, as such losses have been defined in Adam Dairy, dba Rancho Dos Rios (1978) 4 ALRB No. 24, plus interest computed at 7 percent per annum.

(c) Preserve and, upon request, make available to the Board or its agents for examiniation and copying all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terns of this Order.

(d) Sign the Notice to Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice in conspicuous placed on its property for a sixty-(60) day period, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(f) Provide a copy of the attached Notice to each employee hired during the twelve- (12) month period following the date of issuance of this Order.

(g) Mail copies of the attached Notice in all appropriate languages, within thirty (.30) days after the date of issuance of this Order, to all agricultural employees referred to in Paragraph 2(b) above and to all employees employed during the payroll period immediately preceding March 21, 1980 to date.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages to the assembled employees of Respondent on company time and property, at times and placed to be deterined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(i) Notify the Regional Director in writing, within thirty (30) days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall

notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

Dated: August 12, 1981.

Kenneth Cloke
Administrative Law Officer

# NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed by the United Farm Workers of America, AFL-CIO (UFW), the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing at which each side had a chance to present its facts/ the Agricultural Labor Relations Board has found that we failed and refused to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW) in violation of the law. The Board has told us to post and mail this Notice. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives you and all farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to try to get a contract or to help or protect one another; and
6. To decide not to do any of the above things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible, on a collective bargaining agreement. In addition, we will reimburse all workers who were employed at any time during the period from March 15, 1980, to the date we begin to bargain in good faith for a contract, for all losses of pay and other economic losses they have sustained as a result of our refusal to bargain with the UFW.

Dated:

SAM ANDREWS' SONS

By: _____

Representative Title

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board.

This is an offical Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE